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No. 303.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

WILL F. THOMAS, SHERIFF AND COLLECTOR, ET AL., APPELLANTS,

VS.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY ET AL., APPELLEES.

BRIEF OF APPELLEES.

F. H. Moore,
A. F. Smith,
James B. McDonough,
Attorneys for Appellees.

S. W. Moore,
Of Counsel.

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Argument. 7

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STATEMENT.

The Little River Drainage and Levee District of Sevier County, No. 1, Arkansas, containing 12,000 acres of fertile land subject to overflow, and traversed by 3.61 miles of railway, all built above flood level, purposes to reclaim the land by levees and drains, at an estimated cost of $70,000.00 or $75,000.00. The improvement will permit the growing of regular crops, and will double the value of the land, adding at least $300,000.00 to its present value. The railway will receive no benefit from the improvement except a possible increase of tonnage resulting from the additional crops

on the reclaimed land. By virtue of a special law the drainage district is taxing against the railway 54 per cent of the cost of this improvement, and against the 12,000 acres only 46 per cent; that is, the owners of the land whose property is doubled in value, and who get the crops, pay less than half of the cost of the improvement, and the railway company which gets to carry a part of the surplus of the crops not used or sold locally by the owner, pays more than half the cost of the improvement. In the railway company's suit to restrain the collection of this tax the District Court adjudged that the tax was unconstitutional, and the Court of Appeals in affirming that judgment held that the tax was a "discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law." The appellants are appealing to this court to reverse those findings and to uphold this tax. The facts out of which this controversy arises are as follows:

The railway of the Texarkana and Fort Smith Railway Company, leased to and operated by the Kansas City Southern Railway Company, runs practically north and south for about two miles along the extreme western edge of the drainage district, substantially paralleling Little River most of the way. (For convenience the two railway companies are referred to herein as the "railway company.") In times of high water Little River flows over its banks into an old channel and spreads over most or all of the 12,000 acres in the district. The railway company carries its tracks through the district on a fill or dump, the top of which is above

the level of the highest water known in the last forty years (55, 56, 133). (Figures in parenthesis refer to printed pages of the Transcript of Record.) Across the old channel of Little River the railway track is on a trestle, through which the water has run without harm to the railway company except on one occasion of an unprecedented flood when two bents of the trestle were washed out (56). If a levee were built the trestle would still be maintained by the railway company, it being considered a necessity by its engineers, at least until the levee has been demonstrated by time and actual test to be capable of withstanding similar floods (138). The closing of the old channel would require an increased opening at the bridge over the present channel, which would entail a heavy expense upon the railway company (56, 57). The building of a levee would therefore be of no direct benefit to the railway company (56, 68; 67; 70; 77), and both courts below so found (17, 161).

The drainage district was created in 1915 by a special act of the legislature (Acts of Arkansas, 1915, p. 747) and then included about 28,000 acres of land. In 1917 the legislature by another special act (Acts of Arkansas, 1917, p. 348) reduced the area of the district to about 12,000 acres. Section 3 of the act of 1915 imposes upon the board of directors of the drainage district the duty of constructing ditches, drains, sluiceways, flood gates and other construction works. For the purpose of paying for such improvements section 4 of the act empowers the board of directors to assess and levy

annually a tax upon the valuation, as it appears each year on the assessment books of Sevier County, Arkansas, of all lands and tramroads, natural gas and pipe lines, telephone and telegraph lines and the *railroad tracks* of companies in said district, as appraised by the Board of Railroad Commissioners or their successors, not to exceed in any one year the sum of 6 per cent of the assessed valuation of the said property within the district (which tax, incidentally is four times the combined tax rate collectible for all state and county purposes, Sections 8 and 9, Article 16, Arkansas Constitution). There was no finding in the law of 1915 or in the law of 1917 that the property of the railway company (or any other property) would be benefited by this improvement.

The preliminary estimate of the cost of the improvement was $70,000.00 or $75,000.00 (105, 131), but the act places no limit upon how much may be spent for the improvement. Provision is made therein for $150,000.00 of bonds, to bear interest at not exceeding 6 per cent per annum, the time of maturity to be fixed by the board of directors. The actual cost of improvements of this kind ordinarily exceeds the estimated cost, but if the work could be done for $70,000.00 and were paid for with 6 per cent bonds running for twenty years the total cost of the improvement, principal and interest would be $154,000.00, exclusive of the expenses of the district and the cost of collecting the taxes.

In 1917 the board of directors of the district levied a tax of 6 per cent upon the valuation of all property

in the district, and the railway company instituted this proceeding to enjoin the enforcement of the tax against it on the ground that the tax was unconstitutional and illegal. On the trial it was proved by witnesses testifying for the drainage district that the 12,000 acres of land in the district other than railroad property was worth from $140,400.00 to $300,000.00, and appellants concede in their brief (p. 25) that the improvement would add at least $300,000.00 to that value. The tax of 6 per cent upon all of the property in the district other than railroad property was $3,151.52 (24), therefore the assessed value of the 12,000 acres of land was $52,525.33, or about 36 per cent of its lowest estimated real value. The tax upon the property of the railway company was $4,190.00 (23), which would be 6 per cent of $69,910.00, apportioned as follows: 2.1 miles main track at $27,000.00 per mile $56,000.00, .62 mile Neal Springs detour at $17,000.00 per mile $10,540.00, .89 mile side track at $3,000.00, $2,670.00; total $69,910.00 (6). The inventory value of the property of the railway in the district as found by the Interstate Commerce Commission, plus additions and betterments from the Commission's valuation date, amounts to $77,731. The property of the railway company in the district was therefore assessed at a great deal more than 50 per cent of its actual value.

The District Court found that the tax was unconstitutional. In affirming that decision the Court of Appeals thus summed up the facts:

"Examining the evidence, the result is as follows: The district is purely rural. It comprises (as amended by the Act of 1917) approximately 12,000 acres. About 10 per centum of this acreage is now cultivated; the balance being rich wild land, untillable because of marshy or overflow conditions. The improvements contemplated would render practically all of this wild land tillable. The value of all lands in the district (now worth from $8.00 to $40 per acre) would be more than doubled in value by the improvements. Appellees have, within the proposed district, 2.72 miles of main line track and .89 miles of side track. It is all located along the extreme western and northwestern boundaries of the district. The acreage of this railroad property is 40.43 acres. It is, for the most part, constructed upon high fills and a trestle, and is above overflow. The only benefit to appellees from this improvement would be through increased traffic, because of any increased shipments resulting from general cultivation of the land within the district because of the improvement. The basis taken as the benefits to the various pieces of land and the property of the appellees was the valuation for general taxation purposes. This value as to appellees' property included intangibles. The contemplated improvement would cost from $70,000 to $75,000. The property of appellees would pay about half of this cost.

"The showing thus made reveals this result, to-wit: That the cost of an expensive improvement, which will increase the value of about 12,000 acres of land at least a quarter of a million dollars, is to be half paid by appellees, which have within a rural locality 3.61 miles of track, and which are benefited by a problematical increase of traffic through the greater production from the above benefited acreage." (*Thomas v. The Kansas City Southern Ry. Co.*, 277 Fed. 708, 712, 713.)

ARGUMENT.

The tax whose collection the appellees are trying to prevent by this suit is unconstitutional and illegal for the reasons hereinafter stated.

I.

The tax in question is palpably discriminatory and arbitrary because of the inequality of assessment of benefits, and it is therefore unconstitutional under Section 1 of the 14th Amendment of the Federal Constitution.

The general theory upon which any special assessment against property is upheld is "grounded upon the idea that the property assessed has been actually benefited by a public improvement and should respond in proportion to the benefit so received" (277 Fed. 708, 712). The theory of the assessment against the property of the railway company in the drainage district must be this: The land in the district may be reclaimed and cultivated, and then it may produce more crops than at the present time. Out of this increase in the crops the owner will reserve a part for his own use, and may sell the surplus, some locally and some abroad. Of this sold abroad some may move over the Jefferson Highway bordering the district, to some other railway, and some of it may be carried by the appellee railway company, for which carriage it will receive its freight charges. From these charges it must pay the cost of carriage, and the balance will be "profit," after other

charges are deducted therefrom. The "profit" derived from the carriage of freight outside of the district will belong to such outside part, for no benefit can be assessed against property outside of the improvement district (See *Union Tank Line* v. *Wright*, 249 U. S. 275, 39 S. C. R. 276; *Fargo* v. *Hart*, 193 U. S. 490, 24 S. C. R. 498), so the proportionate part of the carriers' profit to be credited to the district in this case would be the proportion of miles in the district to the total miles which the shipment would travel over the line of the railway company. Can anyone seriously contend that the mere possibility of receiving these attenuated profits could give to the railway property in the district a greater increase in its value than the increase in value of all of the land in the district directly and immediately benefited by the improvement?

Appellants contend that the railway company will receive a direct benefit from the construction of the levee because the building of the levee would enable it to abandon one of its present trestles; but the weight of the evidence on that issue was against the appellants, and both courts below expressly found that the improvement would confer no direct benefit upon the railway.

The appellants further contend that as the levees and drains are constructed the property in the district will increase in value and will bear a heavier proportion of the cost of the construction of the levee. We are dealing here with actual conditions and not with improbable prophecies. The unlikelihood of the local authorities undertaking to bear their proper proportion of

the cost of the improvement is demonstrated by the history of what has already been done. It seems that the legislature of Arkansas has the right—and frequently enjoys it—of passing local or special acts (Arkansas Constitution, Article 5, Section 26), and the only condition precedent to the passage of such a local or special act is the giving of a 30 days notice, accomplished by posting handbills in five public places in the locality where the matter or thing to be affected shall be situated, or by publication in some newspaper of general circulation in such locality (Crawford & Moses Digest of the Arkansas Statutes, 1921, Sections 4966, 4967). Although the railway company was evidently intended by the framers of this local statute to contribute a large part of the cost of this enterprise, it was neither consulted or given actual notice of the pendency of the bill (23, 37). The drainage district lies in close proximity to the thriving town of Horatio, and most of the owners of the land in the district live in that town. Horatio will be directly benefited by the development of the land in the drainage district (96, 97), but Horatio is excluded from the district and pays no part of the cost of the improvement. The law was so drafted that although the railway company is a heavy contributor to the cost of the improvement it can have no voice in its management. The property in the district other than railway property is now being greatly under-assessed, and the property of the railway company is being greatly over-assessed. In the light of this history there is little pros-

pect of any substantial increase in the contributions of the owners of the land in the district to the cost of the improvement. And if they did pay a larger part in the future, the railway company could never have restored to it the payments it must make pending that prophesied millenium.

Appellants further contend that the benefits which the property in the district will receive from the improvement have been found by the legislature and therefore the assessment should be maintained, even though it may appear to be exorbitant; and authorities are cited which appellants claim support their contention. But an examination of those authorities will show that in most instances the tax in question was levied under a general statute reasonable in its ordinary application, but creating a hardship in some particular instance. In a few of the cases cited the tax was levied under a special law, but in each of those special laws there was a provision for a hearing at which the property owner was given an opportunity to procure a reduction of his assessment in case it was unjust. In every case cited there is a reservation, either express or implied, that a tax which is palpably discriminatory and shows a clear abuse of the taxing power is unconstitutional and void. It must be borne in mind that the act in question in this case is a special act applicable to a district comprising only 12,000 acres, with only one railroad in it (85, 95), and it is to be presumed that the legislature knew of the assessed valuation of the land and of the railroad in the district, and that it was intended to impose upon the railway com-

pany the burden of paying for a large part of the cost of the improvement. The following authorities illustrate the rule that state legislatures are still subject to the Federal constitution:

"We do not mean to say that if in fact it were made to appear that there was an arbitrary and unwarranted exercise of the legislative power or some denial of the equal protection of the laws in the method of exercising it, judicial relief would not be accorded to plaintiffs aggrieved" (*Hancock* v. *Muskogee*, 250 U. S. 454, 457, 458, 63 L. Ed. 1081).

"The assessment in question there was an assessment for grading and paving, and it was pointed out that a legislature would be warranted in assuming that grading and paving streets in a good sized city commonly would benefit adjoining land more than it would cost. The chance of the cost being greater than the benefit is slight, and the excess, if any, would be small. These and other considerations were thought to outweigh a merely logical or mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation. It was emphasized that there should not be extracted from the very general language of the fourteenth amendment a system of delusive exactness and merely logical form. But when the chance of the cost exceeding the benefit grows large, and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent. Constitutional rights, like others, are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set on the height of buildings without compensation, but to make that limit 5 feet would require compensation and a taking by eminent domain" (*Martin* v. *District of Columbia*, 205 U. S. 135, 27 S. C. R. 440).

"If the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact. * * * The defendant's case is not an incidental result of a rule that as a whole and on the average may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing the local tax in grossly unequal proportions, not because of special conditions applicable to the parcels taxed, but in blind obedience to a rule that requires the result, and it cannot be said that the ordinance as a whole may be regarded as an individual exception under a rule that promises justice in all ordinary cases. The charter provisions as applied to a city like St. Louis must be taken to contemplate such ordinances under the construction given to it by the state courts" (*Gast etc. Co. v. Schneider etc. Co.*, 240 U. S. 55, 36 S. C. R. 254).

In disposing of the case at bar the Court of Appeals thus stated the law governing a case of this kind:

"While the Legislature has a wide discretion in declaring both the existence of benefits and the amount thereof, yet that discretion is not limitless nor irrestrainable by the courts. Such 'benefits from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately correct general results.' *Kansas City Southern Ry. Co. v. Road Improvement Dist.*, 256 U. S. 658, 41 Sup. Ct. 604, 65 L. Ed. 1151, decided by the Supreme Court of the United States, June 6, 1921. Such

assessment cannot stand, if it is 'palpably arbitrary,' or if it is palpably discriminatory. *Kansas City Southern Ry. Co.* v. *Road Improvement Dist., supra; Houck* v. *Little River Drainage Dist.*, 239 U. S. 254, 262, 36 Sup. Ct. 58, 60 L. Ed. 266; *Cast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55, 36 Sup. Ct. 254, 255, 400, 60 L. Ed. 523, 526, 1239). Therefore the test of law to be applied to the facts of this case is whether or not the facts show this assessment to be palpably arbitrary and discriminatory."

"The basis of valuation here employed for benefits is the valuation of all property within the district for general taxation. General taxation and assessment for special benefits are essentially different in their basic characteristics and their legal theories. One is grounded upon the idea that all property should bear a proportion, based upon value, of the burden of general taxation; the other is grounded upon the idea that property actually benefited by a public improvement should respond in proportion to the benefit so received. Obviously, any connection between the value of a given piece of property for general taxation and its value for benefit assessment taxation is purely accidental. Therefore the circumstance that the legislature here took them to be identical carries no more force than if some other basis of value had been selected. * * * The following statement in the opinion in *Kansas City Southern Ry. Co.* v. *Road Improvement Dist., supra*, seems directly applicable to these facts:

"'It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvements; and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely according to area and position. Railroad

property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all.'

"The facts of this case clearly reveal an instance of a 'discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law,' such as is condemned in the cases cited above." (*Thomas* v. *K. C. So. Ry. Co.*, *supra.*)

II.

The tax in question is discriminatory because the property in the district other than railway property is generally and systematically under-valued as compared with the valuation of the railway property, and therefore unconstitutional under Section 1 of the 14th Amendment of the Federal Constitution.

Two men called as witnesses on behalf of the drainage district testified as to the value of the land in the district. E. W. Beeson, a director of the drainage district (87) owns 400 acres of land in the district, 130 acres being in cultivation at the present time. He testified that the cultivated land was worth $50.00 an acre (86); that the land in the district was rich, and if drained and protected, from 75 to 90 per cent of it would be as good as that now under cultivation (82, 85). Mr. Beeson further testified that the land "in the woods" was worth from $8.00 to $12.00 an acre. Joe Graer, a farmer owning 500 acres in the district, testified that the land in cultivation is worth $100.00 an acre

(100) and the uncultivated land is worth from $13.00 to $40.00 an acre (100). Both Mr. Beeson (86) and Mr. Graer (100) testified that the improvement of the district would double the value of the land. About 10 per cent of the land in the district is in cultivation (101). Giving the improved property the minimum value of $50.00 stated by Mr. Beeson, the 1,200 acres of improved land would be worth $60,000.00. Giving to all of the remaining 10,800 acres of unimproved land the minimum value of $8.00 given by the most conservative of the witnesses, the unimproved land would be worth $86,400.00. The total land in the district on that conservative valuation would then be worth $146,400. There was levied against this land an assessment of $3151.62, which would be 6 per cent of $52,525.33, which is about 36 per cent of the value of the land in the district as stated by the witnesses for the district. The value of the property of the railway company in the district as fixed by the Interstate Commerce Commission, with additions and betterments from the Commission's valuation date, is $77,730.00. Its property in the district was assessed by the Arkansas Tax Commission at $69,910.00. Property in Arkansas is assessed on a basis of 50 per cent of its actual value (31), so we have as a result a finding by the Arkansas Tax Commission that the 100 per cent value of the railroad property in the district is $139,820.00, or $62,090.00 more than its real value as found by the Interstate Commerce Commission. It follows therefore that the property of the railway company in the district is either assessed at a

roads or railways of each company or corporation having existence under the laws of this state and incorporated in whole or in part therein and run through or in" Arkansas. Section 9975 provides that "the franchise (other than the right to be a corporation) of all railroads are declared to be property for the purpose of taxation, and the value of such franchises shall be considered by the assessing officers in assessing the property of such corporations. In valuing for assessment purposes the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible." These statutes prove that railroad tracks and franchise and intangible values are separate items. The Tax Commission in making up its report of the assessment of railroad property makes a specific finding as to the value of buildings, materials and stores, rolling stock and side tracks, and unites under the heading of railroad tracks all of the other values of a railway, including the franchise value (29, 30). It is true that this court in *Branson* v. *Bush*, 251 U. S. 189, has held that in determining the value of a railway against which an assessment may be made the franchise value may be included. But the law in that case authorized a tax against "railroads" (Special and Private Acts of Arkansas, 1911, pp. 642, 645), and not merely against railroad *tracks*. The case at bar was tried by the appellants on the theory that the law in question did not authorize a tax against the franchise or intangible value of the railway companies. In their answer they say that they

"deny that there has been assessed against the property of the plaintiff any taxes whatever against their intangible property or personal property" (12). On the trial of the case their counsel made the following statement: "Now, if Your Honor please, I object to that, if he means to imply by that that we have assessed anything against the franchise because that is not the best evidence. In fact we have not. We have only assessed against the track itself" (28). In their assignment of errors (19, 20) the appellants complained of the admission of proof that an intangible or franchise value was included in the property assessed by the district. The law under which the assessment in question is made having limited the property subject to taxation to railroad tracks, and appellants having tried the case on the theory that the tax was not assessed against any other railroad property, they ought not be heard at this time to say that the statute in question authorized the inclusion of an intangible or franchise value in the railroad property subject to assessment by the drainage district.

V.

The boundaries of the district are so indefinitely described as to make it impossible to ascertain what lands are included in the district and what lands are excluded therefrom.

The northern boundary of the district is described as "the line of the hills which is entirely above overflow." The evidence showed that there was no such

definite line (41, *et seq.*). An act indefinitely describing a district is invalid (*Morgan Engineering Co. v. Cache River Drainage District*, 122 Ark. 491).

VI.

The act unlawfully provides for the payment of the debts of another corporation by special assessment against property in the district.

Section 30 of the Act of 1915 provides that the district thereby improved "shall assume and be liable for all indebtedness and contracts of whatsoever kind legally incurred of the said Little River Drainage District organized as aforesaid by the said County Court." The railway company cannot be chargeable with the debts of a corporation of which debts it has no knowledge and for which it has received no benefit.

The judgments of the courts below should be sustained.

Respectfully submitted,

F. H. Moore,
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STATEMENT.

The Little River Drainage and Levee District of Sevier County, No. 1, Arkansas, containing 12,000 acres of fertile land subject to overflow, and traversed by 3.61 miles of railway, all built above flood level, purposes to reclaim the land by levees and drains, at an estimated cost of $70,000.00 or $75,000.00. The improvement will permit the growing of regular crops, and will double the value of the land, adding at least $300,000.00 to its present value. The railway will receive no benefit from the improvement except a possible increase of tonnage resulting from the additional crops

on the reclaimed land. By virtue of a special law the drainage district is taxing against the railways 57 per cent of the cost of this improvement, and against the 12,000 acres only 43 per cent; that is, the owners of the land whose property is doubled in value, and who get the crops, pay less than half of the cost of the improvement, and the railway company which may get to carry part of the surplus of the crops not used or sold locally by the owner, pays more than half the cost of the improvement. In the railway company's suit to restrain the collection of this tax the District Court adjudged that the tax was unconstitutional, and the Court of Appeals in affirming that judgment held that the tax was a "discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law." The appellants are appealing to this court to reverse those findings and to uphold this tax. The facts out of which this controversy arises are as follows:

The railway of the Texarkana and Fort Smith Railway Company, leased to and operated by the Kansas City Southern Railway Company, runs practically north and south for about two miles along the extreme western edge of the drainage district, substantially paralleling Little River most of the way. (For convenience the two railway companies are referred to herein as the "railway company.") In times of high water Little River flows over its banks and spreads over a part or all of the 12,000 acres in the district. Except for one trestle, the railway company carries its tracks through the district on a fill or dump, the top of

which is above the level of the highest water known in the last forty years (55, 56, 133). (Figures in parenthesis refer to printed pages of the Transcript of Record.) Across 510 feet of the district the railway track is on a trestle, through which the water has run without harm to the railway company except on one occasion of an unprecedented flood when two bents of the trestle were washed out (56). If a levee were built the trestle would still be maintained by the railway company, it being considered a necessity by its engineers, at least until the levee has been demonstrated by time and actual test to be capable of withstanding similar floods (138). The closing of the old channel would require an increased opening at the bridge over the present channel, which would entail a heavy expense upon the railway company (56, 57). The building of a levee would therefore be of no direct benefit to the railway company (56, 68; 67; 70; 77), and both courts below so found (17, 161).

The drainage district was created in 1915 by a special act of the legislature (Acts of Arkansas, 1915, p 747) and then included about 28,000 acres of land. In 1917 the legislature by another special act (Acts of Arkansas, 1917, p. 348) reduced the area of the district to about 12,000 acres. Section 3 of the act of 1915 imposes upon the board of directors of the drainage district the duty of constructing ditches, drains, sluiceways, flood gates and other construction works. For the purpose of paying for such improvements section 4 of the act empowers the board of directors to assess and levy

annually a tax upon the valuation, as it appears each year on the assessment books of Sevier County, Arkansas, of all lands and tramroads, natural gas and pipe lines, telephone and telegraph lines and the *railroad tracks* of companies in said district, as appraised by the Board of Railroad Commissioners or their successors, not to exceed in any one year the sum of 6 per cent of the assessed valuation of the said property within the district (which tax, incidentally is four times the combined tax rate which can be levied for all state and county purposes. Sections 8 and 9, Article 16, Arkansas Constitution).

The preliminary estimate of the cost of the improvement was $70,000.00 or $75,000.00 (105, 131), but the act places no limit upon how much may be spent for the improvement. Provision is made therein for $150,000.00 of bonds, to bear interest at not exceeding 6 per cent per annum, the time of maturity to be fixed by the board of directors. The actual cost of improvements of this kind ordinarily exceeds the estimated cost, but if the work could be done for $70,000.00 and were paid for with 6 per cent bonds running for twenty years the total cost of the improvement, principal and interest would be $154,000.00, exclusive of the expenses of the district and the cost of collecting the taxes.

In 1917 the board of directors of the district levied a tax of 6 per cent upon the valuation of all property in the district, and the railway company instituted this proceeding to enjoin the enforcement of the tax against it on the ground that the tax was unconstitutional and

illegal. On the trial it was proved by witnesses testifying for the drainage district that the 12,000 acres of land in the district other than railroad property was worth from $146,400.00 to $300,000.00, and appellants concede in their brief (p. 25) that the improvement would add at least $300,000.00 to that value. The tax of 6 per cent upon all of the property in the district other than railroad property was $3,151.52 (24), therefore the assessed value of the 12,000 acres of land was $52,525.33, or about 36 per cent of its lowest estimated real value. The tax upon the property of the railway company was $4,190.00 (23), which would be 6 per cent of $69,910.00, apportioned as follows: 2.1 miles main track at $27,000.00 per mile $56,000.00, .62 mile Neal Springs detour at $17,000.00 per mile $10,540.00, .89 mile side track at $3,000.00, $2,670.00; total $69,-910.00 (6). The inventory value of the property of the railway in the district as found by the Interstate Commerce Commission, plus additions and betterments from the Commission's valuation date, amounts to $77,-731. The property of the railway company in the district was therefore assessed at a great deal more than 50 per cent of its actual value.

The District Court found that the tax was unconstitutional. In affirming that decision the Court of Appeals thus summed up the facts:

> "Examining the evidence, the result is as follows: The district is purely rural. It comprises (as amended by the Act of 1917) approximately 12,000 acres. About 10 per centum of this acreage

is now cultivated; the balance being rich wild land, untillable because of marshy or overflow conditions. The improvements contemplated would render practically all of this wild land tillable. The value of all lands in the district (now worth from $8.00 to $40 per acre) would be more than doubled in value by the improvements. Appellees have, within the proposed district, 2.72 miles of main line track and .89 miles of side track. It is all located along the extreme western and northwestern boundaries of the district. The acreage of this railroad property is 40.43 acres. It is, for the most part, constructed upon high fills and a trestle, and is above overflow. The only benefit to appellees from this improvement would be through increased traffic, because of any increased shipments resulting from general cultivation of the land within the district because of the improvement. The basis taken as the benefits to the various pieces of land and the property of the appellees was the valuation for general taxation purposes. This value as to appellees' property included intangibles. The contemplated improvement would cost from $70,000 to $75,000. The property of appellees would pay about half of this cost.

"The showing thus made reveals this result, to-wit: That the cost of an expensive improvement, which will increase the value of about 12,000 acres of land at least a quarter of a million dollars, is to be half paid by appellees, which have within a rural locality 3.61 miles of track, and which are benefited by a problematical increase of traffic through the greater production from the above benefited acreage." (*Thomas v. The Kansas City Southern Ry. Co.*, 277 Fed. 708, 712, 713.)

ARGUMENT.

The tax whose collection the appellees are trying to prevent by this suit is unconstitutional and illegal for the reasons hereinafter stated.

I.

The tax in question is palpably discriminatory and arbitrary because of the inequality of assessment of benefits, and it is therefore unconstitutional under Section 1 of the 14th Amendment of the Federal Constitution.

The general theory upon which any special assessment against property is upheld is "grounded upon the idea that the property assessed has been actually benefited by a public improvement and should respond in proportion to the benefit so received" (277 Fed. 708, 712). Appellants contend that the railway company will receive a direct benefit from the construction of the levee because the building of the levee would enable it to abandon one of its present trestles; but the weight of the evidence on that issue was against the appellants, and both courts below expressly found that the improvement would confer no direct benefit upon the railway (17, 161). Therefore, the theory of the assessment against the property of the railway company in the drainage district must be this: The land in the district may be reclaimed and cultivated, and then it may produce more crops than at the present time. Out of this increase in the crops the owner will reserve a part for his own use,

and may sell the surplus, some locally and some abroad. Of that sold abroad some may move over the Jefferson Highway bordering the district, to some other railway, and some of it may be carried by the appellee railway company, for which carriage it will receive its freight charges. There may also result some increase in inbound traffic. Out of this additional revenue the railway company must pay the cost of carriage, and the balance will be "profit," after other charges are deducted therefrom. The increase in value of the railway company's property in the district due to the possibility of receiving these profits is the basis for the tax.

It is fundamental that no benefit can be assessed against property outside of the drainage district. "To do so under any formula," said this Court in *Union Tank Line* v. *Wright*, 249 U. S. 274, "would violate the due process clause of the 14th amendment." The same principle finds ample illustration in *Fargo* v. *Hart*, 193 U. S. 490. Under the express terms of Section 4 of the Act of 1915, the assessment of benefits is limited to the property *in the district*. No doubt the property of other persons outside of the district may be benefited, but no assessment is to be made against it. As an illustration, property in Horatio will receive benefits as great, if not greater, than those received by the railway company, but that property is outside the limits of the improvement district, and no assessments are made against it.

The question, therefore, is, will there be any enhancement in value of the railroad's property *in the dis-*

trict, caused by the proposed improvements, sufficient to justify the assessment made? The enhancement in value within the district must equal the amount of the assessment, otherwise the company's property is taken for public use without compensation.

The effect of increased traffic, due to the construction of these improvements, cannot, in the nature of things, be limited to the railroad property within the district. The segment of road in the district is "a part of the railroad unit" (*Branson* v. *Bush*, 251 U. S. 189). The value of the property of the railroad necessarily rises and falls as a unit. As this court said in *Branson* v. *Bush*:

> "It is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put and how much by another."

To take an extreme illustration, assume the discovery of oil, in large quantity, adjacent to the track of the railroad in Sevier County, Arkansas, and the sudden and extraordinary increase in traffic that would be occasioned thereby. This would not increase the value of the railroad adjacent to the oil well, over and above any other piece of track in the railroad system. The earnings from this traffic would be enjoyed by the railroad as a unit, and whatever increase in value might be occasioned thereby would be spread over all the mileage under one operation and control.

This court said in the *State Railroad Tax* case, 92 U. S. 579, 608, quoted in *Branson* v. *Bush*, *supra*,

> "It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road and apportion the value within the county by its relative length to the whole."

"Every mile," said this court in *Fargo v. Hart, supra*, "is a necessary condition of the use of the rest of the line beyond, and therefore a reflex condition of the value of the line behind it."

The assessment of railroad property for state and county purposes by the State of Arkansas recognizes that the value of the entire railroad is a unit, and it assesses within the state and within each political subdivision, that portion of the value which the mileage bears to the entire mileage. In 1911 (Acts, Arkansas, 1911, page 233), the state enacted a law for the assessment and taxation of all property, tangible and intangible, of railway companies. In Section 1, it is provided that the Tax Commission

> "shall ascertain the value of all property, tangible and intangible, including the franchises (except the right to be a corporation), railroad tracks, rolling stock," etc.

Section 2 provides:

> "The franchises (other than the right to be a corporation) of all railroads, express, telegraph and telephone companies, are declared to be property for the purpose of taxation and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations. In valuing for assessment purposes the property of such corporations, the Arkansas Tax Commission shall determine the total value of the

entire property of the corporation, tangible and intangible."

The assessed valuation of $27,000 per mile of main line in this case, represents the Arkansas mileage proportion of the entire value of the system. "There are," as this Court said in *Louisville & Nashville R. R. Co.* v. *Greene*, 244 U. S. 522, 540, "two recognized methods, known as the stock-and-bond plan and the capitalization-of-income plan" of determining the value of railway property as an entirety. After this value has been ascertained, it becomes a simple problem to assign to the State of Arkansas and to its several subdivisions their proportion of value on a mileage basis.

Assuming an increase in tonnage by reason of the proposed improvements, and that such traffic will be profitable, and that the result will be to increase the value of the entire railroad property, 800 miles long, and bearing in mind that only the enhancement in value within the district itself can be assessed with benefits, we proceed to inquire how much increase in traffic the railway company will have to realize, from that source, in order to justify the proposed assessment.

Let us assume, for purposes of illustration, that the railway company will enjoy an increased annual gross revenue, due entirely to the construction of the proposed improvements of $1000 per year, and that the operating ratio is 75 per cent., *i. e.*, of each dollar of gross revenue, seventy-five cents represents expenses and twenty-five cents represents net revenue or profits. There would result a net revenue, or profit, of 25 per cent. of this

gross revenue, amounting to $250 per year. This net revenue, or profit, would necessarily be spread over the entire mileage of 800 miles. The segment within the district, 2.1 miles of main line, is .26 per cent of the entire mileage. The amount of net earnings, or profits, assignable to the 2.1 miles within the district (.26 per cent of $250), would be $ .65. If we capitalize, at 6 per cent, these net earnings, or profits, amounting to $.65, in order to ascertain the value which they may be said to represent, the result is $10.80. This would represent the increased value of the 2.1 miles of main line of the railroad property within the district, arising from an annual increase of $1000 in freight and passenger gross revenue.

If we assume that the annual gross revenue from traffic in the district is increased tenfold over the sum used in the foregoing illustration, the result would be an enhancement in value of the railroad property within the district of $108.

If we assume an increased annual gross revenue of $100,000 due to the improvement (which, of course, is so large as to be absurd), this would represent an enhancement in value of the railroad property within the district of $1080, which is slightly over *26 per cent* of $4190—the amount of the tax for just one year.

We earnestly contend that, under these circumstances, it is nothing short of a travesty to sustain an assessment of $4190 per year against the property of the railway company. It is fully recognized that in making local assessments certain inequalities will necessarily

arise, due to the very nature of the proceeding, which it is not the policy of the law to undertake to rectify. But this is not an inequality of that character. It is a gross, glaring injustice, which comes clearly within the rule of *Norwood* v. *Baker*, 172 U. S. 269; *Myles Salt Co.* v. *Iberia Drainage Dist.*, 239 U. S. 478, and *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55. It is, to quote the language of this court in *Branson* v. *Bush*, *supra*:

> "a flagrant abuse, and by reason of its arbitrary character, the mere confiscation of particular property."

Can anyone seriously contend that the mere possibility of receiving the attenuated profits that might arise from the proposed improvements would justify the imposition upon the railway company of a tax greater than that imposed upon all of the 12,000 acres of land in the district? We believe this court has answered this question in *Kansas City Southern Ry. Co.* v. *Road Imp. Dist.*, 256 U. S. 658.

The appellants further contend that as the levees and drains are constructed the property in the district will increase in value and will bear a heavier proportion of the cost of the construction of the levee. We are dealing here with the existence of actual facts are not with a prophecy of improbable charges. The unlikelihood of the local authorities undertaking to bear their proper proportion of the cost of the improvement is demonstrated by the history of what has already been done. It seems that the legislature of Arkansas has the right—and fre-

quently enjoys it—of passing local or special acts (Arkansas Constitution, Article 5, Section 26), and the only condition precedent to the passage of such a local or special act is the giving of a 30 days notice, accomplished by posting handbills in five public places in the locality where the matter or thing to be affected shall be situated, or by publication in some newspaper of general circulation in such locality (Crawford & Moses Digest of the Arkansas Statutes, 1921, Sections 4966, 4967). Although the railway company was evidently intended by the framers of this local statute to contribute a large part of the cost of this enterprise, it was neither consulted or given actual notice of the pendency of the bill (23, 37). The drainage district lies in close proximity to the thriving town of Horatio, and most of the owners of the land in the district live in that town. Horatio will be directly benefited by the development of the land in the drainage district (96, 97), but Horatio is excluded from the district and pays no part of the cost of the improvement. The law was so drafted that although the railway company is a heavy contributor to the cost of the improvement it can have no voice in its management. The property in the district other than railway property is now being greatly under-assessed, and the property of the railway company is being greatly overassessed. In the light of this history there is little prospect of any substantial increase in the contributions of the owners of the land in the district to the cost of the improvement. And if they did pay a larger part in the future, the railway company could never have restored

to it the payments it must make pending that prophesied millenium.

Appellants further contend that the benefits which the property in the district will receive from the improvement have been found by the legislature and therefore the assessment should be maintained, even though it may appear to be exorbitant; and authorities are cited which appellants claim support their contention. But an examination of those authorities will show that in most instances the tax in question was levied under a general statute reasonable in its ordinary application, but creating a hardship in some particular instance. In a few of the cases cited the tax was levied under a special law, but in each of those special laws there was a provision for a hearing at which the property owner was given an opportunity to procure a reduction of his assessment in case it was unjust. In every case cited there is a reservation, either express or implied, that a tax which is palpably discriminatory and shows a clear abuse of the taxing power is unconstitutional and void. It must be borne in mind that the act in question in this case is a special act applicable to a district comprising only 12,000 acres, with only one railroad in it (85, 95), and it is to be presumed that the legislature knew of the assessed valuation of the land and of the railroad in the district, and that it was intended to impose upon the railway company the burden of paying for a large part of the cost of the improvement. The following authorities illustrate the rule that state legislatures are still subject to the Federal constitution:

"We do not mean to say that if in fact it were made to appear that there was an arbitrary and unwarranted exercise of the legislative power or some denial of the equal protection of the laws in the method of exercising it, judicial relief would not be accorded to plaintiffs aggrieved" (*Hancock* v. *Muskogee*, 250 U. S. 454, 457, 458, 63 L. Ed. 1081).

"The assessment in question there was an assessment for grading and paving, and it was pointed out that a legislature would be warranted in assuming that grading and paving streets in a good sized city commonly would benefit adjoining land more than it would cost. The chance of the cost being greater than the benefit is slight, and the excess, if any, would be small. These and other considerations were thought to outweigh a merely logical or mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation. It was emphasized that there should not be extracted from the very general language of the fourteenth amendment a system of delusive exactness and merely logical form. But when the chance of the cost exceeding the benefit grows large, and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent. Constitutional rights, like others, are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set on the height of buildings without compensation, but to make that limit 5 feet would require compensation and a taking by eminent domain" (*Martin* v. *District of Columbia*, 205 U. S. 135, 27 S. C. R. 440).

"If the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed

in fact. * * * The defendant's case is not an incidental result of a rule that as a whole and on the average may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing the local tax in grossly unequal proportions, not because of special conditions applicable to the parcels taxed, but in blind obedience to a rule that requires the result, and it cannot be said that the ordinance as a whole may be regarded as an individual exception under a rule that promises justice in all ordinary cases. The charter provisions as applied to a city like St. Louis must be taken to contemplate such ordinances under the construction given to it by the state courts" (*Gast etc. Co. v. Schneider etc. Co.*, 240 U. S. 55, 36 S. C. R. 254).

In disposing of the case at bar the Court of Appeals thus stated the law governing a case of this kind:

"While the Legislature has a wide discretion in declaring both the existence of benefits and the amount thereof, yet that discretion is not limitless nor irrestrainable by the courts. Such 'benefits from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately correct general results.' *Kansas City Southern Ry. Co. v. Road Improvement Dist.*, 256 U. S. 658, 41 Sup. Ct. 604, 65 L. Ed. 1151, decided by the Supreme Court of the United States, June 6, 1921. Such assessment cannot stand, if it is 'palpably arbitrary,' or if it is palpably discriminatory. *Kansas City Southern Ry. Co. v. Road Improvement Dist.*, *supra*; *Houck v. Little River Drainage Dist.*, 239 U. S. 254, 262, 36 Sup. Ct. 58, 60 L. Ed. 266; *Gast Realty Co. v. Schneider Granite Co.*, 240 U.

S. 55, 36 Sup. Ct. 254, 255, 400, 60 L. Ed. 523, 526, 1239). Therefore the test of law to be applied to the facts of this case is whether or not the facts show this assessment to be palpably arbitrary and discriminatory."

"The basis of valuation here employed for benefits is the valuation of all property within the district for general taxation. General taxation and assessment for special benefits are essentially different in their basic characteristics and their legal theories. One is grounded upon the idea that all property should bear a proportion, based upon value, of the burden of general taxation; the other is grounded upon the idea that property actually benefited by a public improvement should respond in proportion to the benefit so received. Obviously, any connection between the value of a given piece of property for general taxation and its value for benefit assessment taxation is purely accidental. Therefore the circumstance that the legislature here took them to be identical carries no more force than if some other basis of value had been selected. * * * The following statement in the opinion in *Kansas City Southern Ry. Co.* v. *Road Improvement Dist., supra*, seems directly applicable to these facts:

"'It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvements; and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely according to area and position. Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all.'

"The facts of this case clearly reveal an instance of a 'discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law,' such as is condemned in the cases cited above." (*Thomas v. K. C. So. Ry. Co.*, *supra*.)

II.

The tax in question is discriminatory because the property in the district other than railway property is generally and systematically under-valued as compared with the valuation of the railway property, and therefore unconstitutional under Section 1 of the 14th Amendment of the Federal Constitution.

Two men called as witnesses on behalf of the drainage district testified as to the value of the land in the district. E. W. Beeson, a director of the drainage district (87) owns 490 acres of land in the district, 130 acres being in cultivation at the present time. He testified that the cultivated land was worth $50.00 an acre (86); that the land in the district was rich, and if drained and protected, from 75 to 90 per cent of it would be as good as that now under cultivation (82, 85). Mr. Beeson further testified that the land "in the woods" was worth from $8.00 to $12.00 an acre. Joe Graer, a farmer owning 500 acres in the district, testified that the land in cultivation is worth $100.00 an acre (100) and the uncultivated land is worth from $13.00 to $40.00 an acre (100). Both Mr. Beeson (86) and Mr. Graer (100) testified that the improvement of the district would double the value of the land. About 10

per cent of the land in the district is in cultivation (101). Giving the improved property the minimum value of $50.00 stated by Mr. Beeson, the 1200 acres of improved land would be worth $60,000.00. Giving to all of the remaining 10,800 acres of unimproved land the minimum value of $8.00 given by the most conservative of the witnesses, the unimproved land would be worth $86,400.00. The total land in the district on that conservative valuation would then be worth $146,400. There was levied against this land an assessment of $3151.62, which would be 6 per cent of $52,525.33, which is about 36 per cent of the value of the land in the district as stated by the witnesses for the district. The value of the property of the railway company in the district as fixed by the Interstate Commerce Commission, with additions and betterments from the Commission's valuation date, is $77,730.00. Its property in the district was assessed by the Arkansas Tax Commission at $69,910.00. Property in Arkansas is assessed on a basis of 50 per cent of its actual value (31), so we have as a result a finding by the Arkansas Tax Commission that the 100 per cent value of the railroad property in the district is $139,820.00, or $62,090.00 more than its real value as found by the Interstate Commerce Commission. It follows therefore that the property of the railway company in the district is either assessed at a great deal more than 50 per cent of its actual value or there is added as franchise or intangible value the enormous sum of $62,090.00 for that part of the railway in the district (31). On either hypothesis the ratio of as-

sessed value to actual value of the railway property and the ratio of the assessed value of the other property in the district to its real value do not even approach equality. A tax based on such an unequal method of assessment is invalid. (*Sioux City etc. Co. v. Dakota County, Nebr.*, 43 S. C. R. 190.)

III.

The tax in question is assessed upon the value of all of the property of the railway company in the district, including the intangible or franchise value of that part in the district, when under the provisions of the act such intangible or franchise value is not subject to assessment.

Both courts below found that the value of the railway company's property upon which the tax in question was levied, included the franchise or intangible value (17, 161). Section 4 of the Act of 1915 confers upon the directors of the drainage district the power to assess and levy annually a tax upon the valuation of certain property, including "the *railroad tracks* of companies in said district, as appraised by the Board of Railroad Commissioners or their successors." Section 11 of Article 16 of the Constitution of Arkansas specifically provides that "no tax shall be levied except in pursuance of law, and every law imposing a tax shall *state distinctly* the object of the same." The legislature having stated distinctly that railroad *tracks* are the only parts of the property of the railroads subject to taxation in the district, the board of directors of the drainage district had no authority to levy a tax against all

of the property of the railway company, including the franchise value of the railway. Acts of Arkansas, 1911, p. 233, now Section 9974, Crawford & Moses Digest of Arkansas Statutes, 1921, provides that the State Tax Commission in assessing the property of the railroad companies shall "ascertain the value of all property, tangible and intangible, including the franchise (except the right to be a corporation), railroad tracks, rolling stock, water and wood stations, passenger and freight depots, office furniture and other property, real and personal, owned by each of the railroads or railways of each company or corporation having existence under the laws of this state and incorporated in whole or in part therein and run through or in" Arkansas. Section 9975 provides that "the franchise (other than the right to be a corporation) of all railroads are declared to be property for the purpose of taxation, and the value of such franchises shall be considered by the assessing officers in assessing the property of such corporations. In valuing for assessment purposes the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible." These statutes prove that railroad tracks and franchise and intangible values are separate items. The Tax Commission in making up its report of the assessment of railroad property makes a specific finding as to the value of buildings, materials and stores, rolling stock and side tracks, and unites under the heading of railroad tracks all of the other values of a railway, includ-

ing the franchise value (29, 30). It is true that this court in *Branson* v. *Bush*, 251 U. S. 189, has held that in determining the value of a railway against which an assessment may be made the franchise value may be included. But the law in that case authorized a tax against "railroads" (Special and Private Acts of Arkansas, 1911, pp. 642, 645), and not merely against railroad *tracks*. The case at bar was tried by the appellants on the theory that the law in question did not authorize a tax against the franchise or intangible value of the railway companies. In their answer they say that they "deny that there has been assessed against the property of the plaintiff any taxes whatever against their intangible property or personal property" (12). On the trial of the case their counsel made the following statement: "Now, if Your Honor please, I object to that, if he means to imply by that that we have assessed anything against the franchise because that is not the best evidence. In fact we have not. We have only assessed against the track itself" (28). In their assignment of errors (19, 20) the appellants complained of the admission of proof that an intangible or franchise value was included in the property assessed by the district. The law under which the assessment in question is made having limited the property subject to taxation to railroad tracks, and appellants having tried the case on the theory that the tax was not assessed against any other railroad property, they ought not be heard at this time to say that the statute in question authorized the inclusion of an intangible or franchise value in the railroad property subject to assessment by the drainage district.

IV.

The boundaries of the district are so indefinitely described as to make it impossible to ascertain what lands are included in the district and what lands are excluded therefrom.

The northern boundary of the district is described as "the line of the hills which is entirely above overflow." The evidence showed that there was no such definite line (41, *et seq.*). An act indefinitely describing a district is invalid (*Morgan Engineering Co. v. Cache River Drainage District*, 122 Ark. 491).

V.

The act unlawfully provides for the payment of the debts of another corporation by special assessment against property in the district.

Section 30 of the Act of 1915 provides that the district thereby improved "shall assume and be liable for all indebtedness and contracts of whatsoever kind legally incurred of the said Little River Drainage District organized as aforesaid by the said County Court." The railway company cannot be chargeable with the debts of a corporation of which debts it has no knowledge and for which it has received no benefit.

The judgments of the courts below should be sustained.

Respectfully submitted,

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